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No. 93 - 1550

In the Supreme Court

of the

United States

October Term, 1993

MICHELLE CORWIN et al.
Petitioners,

vs.

DENNIS MARK et al,
Respondents

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Respondent
in propria persona

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QUESTIONS PRESENTED:

Petitioners ask *cert.* on three questions.

As to Petitioners' first Question, whether the *en banc* court improperly rejected their claim that *Renne v. Geary* 501 US 312 could be used to deny redressability as to the statute voided by the *en banc* court, Respondents oppose granting *cert.*, except as part of a grant of *cert.* on the Question proposed by Respondents in their Cross-Petition:

Did *Renne v. Geary* 501 US 312 significantly increase plaintiffs' burden to prove justiciability or redressability, or significantly reduce listener standing? If so, how?

Specifically:

(a) To challenge a censorship law, must plaintiffs show the relief sought would "completely" redress the injury, and that there are no other laws that could possibly be used to cause the same injury?

(b) Do readers have standing to challenge election laws specifically authorizing censorship of statements in voter pamphlets if the laws have been used on many recent occasions?

(c) Do speakers present a justiciable controversy in challenging laws authorizing censorship of voter pamphlet statements if a proceeding under those laws was prosecuted against them shortly after they filed their challenge?

The first of these is directly related to the first Question proposed by Petitioners. The others involve other applications of *Renne* in the same *en banc* decision.

Respondents oppose granting *cert.* on Petitioners' second and third Questions, whether the *en banc* court wrongly voided a statute on its face and in entirety, as academic, not raising a principle capable of clarification, and solely based on an overly-literal interpretation of the *en banc* ruling.

LIST OF ALL PARTIES:

This case is the consolidation of related cases *Geary et al. v. Renne et al.* and *Mark et al. v. Corwin et al.*

Petitioners' List of All Parties lists only the parties from *Mark v. Corwin*, presumably because they seek *cert.* only on the part of the *en banc* ruling stemming from that case. Since the Court may choose for any grant of *cert.* to include the entire *en banc* ruling, the following parties from *Geary v. Renne* should be added to Petitioners' List of All Parties:

Petitioner Jay Patterson was San Francisco Registrar of Voters when *Geary v. Renne* was filed. Petitioner Dianne Feinstein was Mayor of San Francisco when *Geary v. Renne* was filed.

Petitioner San Francisco Board of Supervisors is the governing body of the City and County of San Francisco.

Respondents Melissa Gundrun, Wayne Johnson, David Soule, Peter Johnson, Robert Gebert and Sudi Trippet are residents and registered voters of the City and County of San Francisco.

Respondent Election Action is an association of San Francisco residents and voters.

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TABLE OF AUTHORITIES:

Blount v. Rizzi (1971) 400 US 410: 7

Freedman v. Maryland (1965) 380 US 51: 7

Mills v. Alabama (1966) 384 US 214: 7

Renne v. Geary (1991) 501 US 312: *passim.*

Southeastern Promotions v. Conrad (1975) 420 US 546: 7

California Civil Code §3422: 4

California Code of Civil Procedure §§ 1060, 1085: 4

California Elections Code §§ 10012, 10013.5: *passim.*

California Elections Code §10015: 4

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI:

Respondents Dennis Mark *et al.* ask that Petitioners' writ of *cert.* be denied as to their first Question Presented, concerning redressability, except if granted as part of a grant of *cert.* on the general Question Presented in Respondents' Cross-Petition for *Cert.*, whether *Renne v. Geary* 501 US 312 significantly changed prior criteria of justiciability, redressability and standing, including whether plaintiffs challenging a statute now must show that no other statute exists which might be used to cause the same injury.

Respondents believe clarification of *Renne* is needed. But if such is not included, Respondents oppose granting *cert.* on Petitioners' first Question, since Petitioners are merely trying to use this Court as an appeals court, and offer no possibility for any clarification of law.

True, the *en banc* court denied Petitioners' *Renne*-based nonredressability claim "without even addressing" it. But Petitioners aren't actually asking for *cert.* on the issue of whether *en banc* courts must explain their rulings; if that were the Question, Respondents would support *cert.*, given how the same *en banc* opinion also didn't explain its rulings adverse to Respondents (see Cross-Petition for *Cert.*).

On its face, Petitioners' first Question asks whether their nonredressability claim should have been *addressed;* but their petition makes clear that they want this Court to rule that their claim should have been *granted.*

The latter issue would be well worth a grant of *cert.*, but only for the purpose of clarifying *Renne*. This would also allow review of the other parts of the *en banc* decision, in which challenges to other statutes were dismissed as without a justiciable controversy based on *Renne*.

As to Petitioners' second and third Questions, whether the *en banc* court wrongly voided a statute "on its face" and "in its entirety", Respondents oppose *cert.* on the basis that they offer no potential for clarifying any legal principles, and would merely be using this Court as an appeals court, asking for a ruling that existing principles were violated.

Also, any error is academic, causing no apparent harm to anyone; at worst, the state needs to re-enact the statute to include judicial review. Further, the actual error is probably Petitioners' too-literal interpretation of the *en banc* ruling.

REASONS FOR DENYING *CERT.*:

Petitioners' first Question appeals an almost-unexplained *en banc* affirmance of a district court ruling that §10012 unconstitutionally authorizes administrative censorship of voter-pamphlet candidate statements.

(Respondents challenge the even-more-unexplained *en banc* dismissal of the actions dealing with §§ 3795, 5025 and 10013.5 for lack of a justiciable controversy, citing *Renne*; see Cross-petition for Writ of *Cert.*)

Petitioners argue at p 13 that, under *Renne*, plaintiffs must show that the relief sought would "completely" redress their injury. Such an unlikely interpretation of *Renne* would not in itself deserve a hearing in this Court, except as part of the Question proposed by the Cross-Petition, whether *Renne* significantly changed justiciability criteria.

But even if *Renne* is authority for the view that existence of overlapping statutes generally defeats redressability, the overlapping statute, §10013.5, allowing judicial censorship of the candidate statements, was also under challenge in the same suit. Further, what was found unconstitutional about §10012 was that it authorized *administrative* censorship, which no other statute authorized.

Petitioners' second and third Questions, whether the *en banc* court wrongly voided §10012 "on its face" and "in its entirety", involve a confusion attributable to Petitioners' own change of position as to whether §10012 authorized administrative censorship.

In the District Court they said it *did* (City's Appendix D-2 fn 2); when that didn't work, they later said it *didn't*, their current position.

It may be that where the *en banc* court said §10012 was void "in that" it authorizes administrative censorship, they might better have said "insofar as".

But, at worst, this only means that the legislature has to write a new statute requiring judicial proceedings, instead of the federal courts saving them the trouble by construing the old statute to have such a requirement.

Further, Petitioners at p 11 fn 11 admit they aren't even sure that the *en banc* court voided §10012 on its face and in entirety; it may have only been voided *as applied*, as the complaint requested. If a more reasonable interpretation is available, we ought not choose a less reasonable alternative.

(A) *RENNE* DOES NOT REQUIRE SHOWING RELIEF SOUGHT WOULD REDRESS INJURY "COMPLETELY".

At p 13 the Petition for *Cert.* states the proposed new *Renne*-based redressability criterion (emph. added):

> In this case, the same situation exists as in *Renne*. The complainants have failed to meet their burden of showing that the relief sought, even if granted, would *completely* redress the injury alleged.

While Petitioners were unable to find anything in *Renne* to quote to support this extreme interpretation, the above distortion shows *Renne* needs clarification.

The *Renne* majority only denied redressability because it felt the only apparent injury, voter-pamphlet deletions, was unlikely to be ended by voiding of §6(b), since the same injury could occur under §10012, which wasn't challenged in that suit and which was so different from §6(b) that the (facial) voiding of one would not undermine the other.

Both dissents, Justice White's concluding that §6(b) was valid and Justice Marshall's concluding it was invalid, agreed not only that the majority erred in doubting redressability, but also that the majority opinion created a dangerous new rule. As Justice White put it at 111 SCt 2331, 2344:

> A constitutional challenge to a law is not barred merely because other laws might also mandate the allegedly unconstitutional action.
>
> If so, it would mean that the States or the Federal Government could insulate unconstitutional laws from attack simply by making them redundant.

Justice Marshall repeated this warning at 111 SCt 2347:

> If the existence of overlapping laws could defeat redressability, legislatures would simply pass "backup" laws for all potentially unconstitutional measures.
>
> Thereafter, whenever an aggrieved party brought suit challenging the State's infringement of his constitutional rights under color of one law, the State could advert to the existence of the previously unrelied-upon backup law as an alternative basis for continuing its unconstitutional policy, thus defeating the aggrieved party's standing.

The majority neither confirmed and defended this version of their position, nor did they disavow it. But as much as

Respondents might agree with the dissents that redressability existed, we think they clearly exaggerated the majority position, which only said overlapping statutes *sometimes* defeat redressability, not that they *generally* do.

The majority's unclarity likely resulted from the fact that the issue was never litigated. None of the parties and none of the judges even raised the redressability issue, in the District Court, during the 3-judge panel's review or during *en banc* review. It was not included in the Question on which *cert.* was granted, nor raised in either party's briefs, and was brought up for the first time at oral argument.

The unclarity could have been avoided if the Court had remanded for determination of redressability, or requested briefing, rather than decide an unlitigated issue. Now, the only way to end the unclarity is for the Court to explicitly disavow the dissents' interpretation of *Renne* (or, perhaps, to admit that *Renne* was a major break from precedent).

(1) The main overlapping statute was also challenged.

Petitioners say redressability is defeated if there is any other law that might be used to cause the same injury.

Renne said §6(b) could not be voided for implicitly authorizing candidate-statement censorship if §10012, which does so explicitly, was not also challenged.

At p 16-17, Petitioners now say §10012 in turn can't be tested unless the suit also challenges: §10013.5 (which they now say is an implied part of §10012); also §10015 (a more general statute allowing writs of mandate to correct errors, omissions or neglect of duty under election law or constitution); and even Code of Civil Procedure §§ 1060 (the generic declaratory-judgment statute) and 1085 (the generic writ-of-mandate statute), neither of which is election-related.

At p 13 they say their goal: **"assuring that federal courts not entertain actions to strike down state laws except when absolutely necessary"**. Yet they say that instead of testing the one or two most relevant provisions, Mark should have challenged *six* (actually *seven;* they neglected Civil Code §3422, the generic injunction statute), even though at least a few of them would be voided unnecessarily!

But *Renne*'s logic was that (facial) voiding of §6(b), which banned political parties from voicing opinions for or against candidates for non-partisan office, would not mean §10012's voter-pamphlet subject-matter restriction was also void.

By contrast, there is no arguable rationale whereby such censorship under any other provision could be valid if the combination of §§ 10012 and 10013.5 is void.

§10012 could be void for allowing administrative censorship without §10013.5 also being void (assuming Petitioners are wrong about the one implicitly including the other). But this *would* suffice to prevent the injury of deletions from candidate-statements, or at least reduce its frequency; the main reason for banning administrative censorship is obviously to make censorship more difficult (and less common). And, in any event, §10013.5 *was* challenged in this suit!

(2) The challenge to §10013.5 was not moot or unripe.

At p 15 Petitioners admit the suit challenged both laws. Yet they argue that the §10013.5 challenge doesn't count:

> **While Mark had made such a challenge, the...claim was indisputably moot. The controversy there alleged was not live at the time the complaint was filed. *See Renne*, 111 SCt at 2338. The *en banc* court so held.**

The *en banc* ruling said <u>*nothing*</u> about mootness! Neither did *Renne*, which held that it was too <u>*soon*</u> to challenge §6(b), not that it was too <u>*late*</u> to do so!

But Petitioners' own words at p 14 show the §10013.5 issue is neither moot nor unripe (emph. in original):

> **...another statute exists - §10013.5 - that could be (and indeed, *has* been) used to delete portions of candidate's statements before they are published...**

Since §10013.5 not only "could be" but also "*has* been" used to censor, the issue is clearly ripe even by the most extreme interpretation of *Renne*. Since it not only "*has* been" but also "could be" so used, it is also clearly not moot.

Petitioners hold that censorship challenges are not live unless a censorship attempt is shown to be either pending or impending on the day the complaint is filed.

Rather than openly defend such a distortion of *Renne*, they falsify the record by saying at p 15 fn 14 that the sole controversy raised as to §10013.5 was in ¶20 of the *Mark* complaint, concerning its use at a prior election (p 15 fn 14). They ignore ¶¶ 21 and 22, which complain that Petitioners claim the right to use §10013.5 to censor candidate statements and threaten to continue to do so; and ¶23, which defines the controversy as concerning §10013.5's validity, not its prior use. See City's Appendix at E-7.

(3) Only §10012 lacks assurance of judicial review.

Obviously, §10012 *allows* judicial review, and it *could* be construed to require it. But Petitioners originally opposed any such interpretation. At p 21, they now admit error:

> **In this case, the City recognized that its former registrar misapplied §10012 by deleting portions of candidate's statements without obtaining a court order.**

They make it sound as if they fired her for this, but she was just applying the City's official interpretation of the law. The District Court noted (City's Appendix D-2 fn 2):

> **The parties agree, however, that the statute provides the clerk with authority to delete partisan references from candidate statements.**

Petitioners first said this administrative censorship was valid since it only involved objective, ministerial decisions. That argument failing, their alternative was for *the court* to reconstrue the law, which the court refused to do (*id.*, D-9):

> **Alternatively, defendants suggest that the court construe §10012 to require the use of the judicial procedure set out in §10013.5.**
>
> **However, this court has no jurisdiction to issue a limiting construction regarding a state law.**

Now that Petitioners have changed their minds and decided that §10012 implicitly incorporates §10013.5's requirement of judicial proceedings, they must admit this isn't obvious, and that it can easily be read as *not* requiring this (as *they* read it, until they lost in the district court). This is ample basis to conclude it lacks adequate procedural safeguards.

(4) §10012 can't be saved by other statutes' safeguards.

If the Ninth Circuit can construe "not clearly germane" to mean "clearly *not* germane" (City's Appendix B-12 fn 1), the jurisdictional bar on federal courts construing state laws must not be very real; no wonder the same panel felt free to construe §10012 to include §10013.5. Their *entire* discussion of this: "Enforcement is through §10013.5." (City's Appendix B-14) At least they should have noted they were construing it differently from everyone before, including the judge and *both* parties in the district court proceedings.

But even if federal courts may sometimes construe state laws in novel ways, using those with safeguards to save the validity of those without them, the precedents concerning administrative censorship are to the contrary.

Past decisions of this Court make clear that speakers and listeners can challenge laws and policies permitting invalid *non-judicial* censorship, even if alternative statutory vehicles exist to suppress the same speech by *judicial* proceeding. See *Freedman v. Maryland* (1965) 380 US 51, 59-60; *Blount v. Rizzi* (1971) 400 US 410, 417; *Southeastern Promotions* (1975) 420 US 546, 560.

Those cases all voided administrative censorship schemes aimed at *erotic* expression, usually held to be among the *least* protected subject-matters. §10012 involves *electoral* speech, usually held to be among the *most* protected. See *Mills v. Alabama* (1966) 384 US 214. Candidates and voters must therefore have at least as much right as pornography-sellers to complain of administrative censorship practices. Whether alternative procedures for censorship through judicial proceedings exist, which the courts could construe as the enforcement mechanism for §10012 (or which Petitioners could use to the same effect if §10012 were voided), is as irrelevant as it was in *Freedman* and its progeny.

Freedman, 380 US at 59, requires that the speaker:

> **...must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, [permit the speech] or go to court.**

Petitioners cite no California statute or court decision by which Respondents are "assured" that election officials will *ever* go to court to obtain judicial review of decisions to censor material from candidate statements under authority of §10012. Even if Petitioners' proposed construction is plausible and would solve their problems, they can't call it "authoritative". Their only "authority" is the Ninth Circuit, and *no* federal court, not even the US Supreme Court, can give an "authoritative" construction of a California statute; despite the Supremacy Clause, no such interpretation would be binding on state officials.

Just as §10012 let Petitioners seek judicial approval, it also let them censor administratively, as their own acts proved. The District Court held (City's Appendix D-8,9):

> **It does not provide for any of the procedures required by *Freedman* before such partisan references may be deleted by the city or county clerk.**
>
> **Accordingly, the statute is constitutionally deficient.**

Had the *en banc* court not reinstated this ruling, Petitioners would <u>*still*</u> be free to do this censoring administratively!

(B) EVEN IF §10012 WAS VOIDED ON ITS FACE AND IN ENTIRETY, ANY ERROR WAS HARMLESS AND INVITED.

While a grant of *cert.* on Petitioners' first Question in combination with the Cross-petition's Questions could serve to clarify *Renne*, there is no apparent way Petitioners' other Questions could lead to any clarification of law.

They claim the *en banc* court violated the clear principles against voiding a law on its face when the challenge was only to its application, and against voiding a law in entirety when the complaint also did not seek that relief.

But those principles are already quite clear, and Petitioners offer no ideas on how to make them clearer. Thus they are really using their *cert.* petition as a way to appeal from a ruling they say violated existing clear principles.

(1) Petitioners "assume" an overly-literal interpretation.

Petitioners advocate construing so as to save validity; they should practice what they preach. At p 11 fn 11 and again at p 28, they admit they're just *assuming* the worst possible interpretation of the ruling (to enhance their complaint?):

> For purposes of this Petition, the City assumes that the Ninth Circuit intended to invalidate §10012 on its face and in its entirety.
>
> The meaning of the Court's decision, however, is not free from doubt, due to the summary nature of the *en banc* court's Order....
>
> "....We believe that at least two interpretations may be made regarding the wording of the existing order.
>
> "One would invalidate §10012 in its entirety.
>
> "Another would invalidate the section only insofar as it applies to the clerk's authority to delete 'partisan references.'...."....
>
> For purposes of this Petition, we assume that the decision renders the statute completely unenforceable.

It is more reasonable to assume that the ruling applies to the clerk's authority to delete *anything*, since the issue was administrative censorship. But if the ruling can be fairly construed to apply to the clerk's authority to delete partisan references, and if Petitioners consider this reasonable, why assume the unreasonable interpretation by which the *en banc* court made a shameful error? Why not assume they just granted *the challenge to the administrative censorship*?

(2) Petitioners' change-of-position caused the confusion.

Petitioners complain that the *en banc* court said that they conceded §10012 was invalid when they only conceded that their application of it was improper.

But Petitioners are to blame for any confusion. They should have noted that their new position reversed not only their claim that they had a right to censor administratively, but also their claim that §10012 gave them that right.

When Petitioners conceded in the district court that §10012 authorized them to delete without judicial approval (City's Appendix D-2 fn 2), and then conceded to the *en banc* court that their censorship under color of §10012 was unlawful for lack of judicial approval, *without adding that they were withdrawing their previous concession,* the *en banc* court understandably added the two concessions together and concluded that Petitioners were saying their admittedly-illegal action was allowed by §10012, and thus that §10012 was invalid for allowing illegal administrative censorship.

Petitioners' current position should be stated precisely. They no longer claim their action was in any way authorized by §10012 or any other law. They now say what they did (and defended in the district court) was in blatant violation of §10012's plain implied incorporation of §10013.5's enforcement mechanism. (They don't yet seem to admit that the censorship was unconstitutional as well as illegal, nor that it was §10012's lack of assurance of judicial review that made their misapplication possible, and could allow someone else to repeat the mistake tomorrow.)

This unforeseeable, *sub silento* change of position evidently misled the *en banc* court to think Petitioners now concede that §10012 (City's Appendix A-3, emph. added):

> **...is constitutionally deficient in that it authorizes an administrative officer to impose a prior restraint on speech without adequate procedural safeguards.**

The court should instead have used the complaint's language (City's Appendix E-8, emph. added), and voided §10012:

> **...insofar as said statute authorizes administrative censorship of candidate statements.**

What is "void" about §10012 is the clause that is *absent* from it. It is void "in that" it lacks procedural safeguards, and "insofar as" it lacks procedural safeguards. If Petitioners want that void filled, why don't they do it themselves?

(3) Any error was harmless and only of academic interest.

Even if the *en banc* court voided §10012 on its face and in entirety, it still isn't clear either that any problem even exists, or that Petitioners can't fix for it themselves.

At p 7 and 11 Petitioners suggest a possible problem to result from unnecessary voiding of the entire statute:

> **The District Court's decision appears to strike down §10012 on its face, leaving cities and counties throughout California with no authorization to publish and distribute candidate's statements.**
>
> **....§10012....provides the sole statutory authorization for counties to publish candidate's statements...**

One might infer that 100 California cities and counties have been unable to print candidate statements for the five years since they've lacked statutory authorization. If so, why don't they just have the legislature pass a new law?

San Francisco itself is currently having its *eighth* election since the April 1989 ruling. The Legislature might not have time to deal with anything as unimportant as candidate statements, but the San Francisco Board of Supervisors is one of the Petitioners in this case. Why don't they just pass an ordinance barring the registrar from censoring candidate statements without judicial approval? If they did that, there would no longer be an absence of procedural safeguards, so §10012 would no longer be invalid, and they could feel free to start printing candidate statements again.

If the problem isn't urgent enough for Petitioners to fix it themselves, is it worth this Court's time?

Of course, if San Francisco has actually stopped printing candidate statements (based on their claimed assumption that "the decision renders the statute completely unenforceable", *id.*, p 28), Petitioners would know it, and would have said so. Since they didn't, it is clear they've made no such assumption - except, *id.*, "[f]or purposes of this Petition"!

CONCLUSION:

Since Petitioners' Questions offer little possibility for useful clarification of law, *Cert.* should be denied, unless as part of the review of *Renne* proposed by Cross-petitioners.

Respectfully submitted 4/17/1994.

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